Supreme Court, U.S.
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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

THE KIOWA TRIBE OF OKLAHOMA,
Petitioner,

v.

ROBERT M. HOOVER, JR.,
Respondent.

Petition For Writ Of Certiorari To The
Supreme Court Of Oklahoma

PETITION FOR WRIT OF CERTIORARI

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March 6, 1996

15 pp

QUESTIONS PRESENTED

Whether, under the Indian Commerce Clause, a federally recognized Indian tribe that has not waived its sovereign immunity, is subject to damage suit in state court because the commerce from which the suit arises took place, in part, outside tribal territory.

Whether, under the Supremacy Clause, a state court may rely upon state concepts of comity to refuse to honor an Indian tribe's federally defined and controlled sovereign immunity to damage suits.

LIST OF PARTIES

The Kiowa Tribe of Oklahoma
Petitioner/Defendant

Robert M. Hoover, Jr.
Respondent/Plaintiff

J.T. Goombi
Leonard Anquoe
Maimie Bohay
Allene Woodward
George Tahbone
Charles Hines

Petitioner's co-defendants against whom no relief has been granted

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Petition For Writ Of Certiorari To The Supreme Court Of Oklahoma

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Petitioner, The Kiowa Tribe of Oklahoma, respectfully prays that a writ of certiorari issue to review the decision of the Supreme Court of Oklahoma entered on December 12, 1995.

OPINION BELOW

The opinion of the Oklahoma Supreme Court is reported as *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okla. 1995). The text of the opinion is reproduced in the Appendix.

JURISDICTION

The opinion of the Oklahoma Supreme Court was entered December 12, 1995. This Court's jurisdiction to consider this petition from the final judgment or decree by the highest court of the state in which the decision could be had is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

Article I, Section 8, Clause 3 of the United States Constitution:

> "The Congress shall have Power . . .
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ."

Article VI, Clause 2, of the United States Constitution:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . ."

STATEMENT OF THE CASE

The Kiowa Tribe of Oklahoma (the "Tribe") is a federally recognized Indian tribe. Under federal law, federally recognized Indian tribes are immune to damage suit, absent Congressional authorization or a waiver by the tribe.

In 1990, the Tribe purchased from Robert M. Hoover, Jr. ("Hoover") a portion of the shares of stock of an Oklahoma business corporation. The Tribe gave a promissory note, secured by a pledge of the shares, as consideration for the purchase.

The Tribe did not waive its immunity to damage suits or otherwise consent to be sued in any Court. Rather, the Tribe expressly reserved its sovereign rights. The promissory note stated:

> Nothing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma. (R. 7)[1]

The Security Agreement pledging the shares had a comparable reservation of sovereign rights. (R. 12)

The note and security agreement were executed at the tribal governmental complex. (R. 63-64) There is little, if any, other significant connection with tribal territory. The corporation, in which shares were purchased, was in the aircraft repair business at a location outside tribal territory. (R. 65-66)

The Tribe defaulted by failing to make scheduled note payments. Hoover sued the Tribe in the District Court of Oklahoma County, State of Oklahoma.

The Tribe raised its federally recognized immunity to suit on a motion to dismiss. (R. 21) The district court ruled in favor of the Tribe. The district court recognized that the Tribe had, under federal law, sovereign immunity from a damage suit, unless there was a Congressional waiver of that immunity or consent to suit by the Tribe itself. The absence of any waiver or consent, and the express reservation of the

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[1]References to ("R.____") are to the record on appeal in *Hoover v. The Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okla. 1995).

Tribe's sovereign rights in the negotiated documents, were fatal to plaintiff's claim.[2] (R. 67-69) Hoover appealed.

On appeal, the Tribe again urged, in its Answer Brief, that, as a matter of federal law, it was immune to suit, absent Congressional waiver or consent by the Tribe. The Oklahoma Supreme Court reversed the district court. The Oklahoma Supreme Court held that there is no immunity to a suit which arises from commerce with an Indian tribe outside tribal territory.[3] The court reasoned that, in the absence of federal ouster of Oklahoma's judicial power, Oklahoma courts have inherent authority to hear damage suits against Indian tribes. The cited authority for this proposition was its own decision in *Lewis v. Sac and Fox Tribe of Oklahoma Housing Authority*, 896 P.2d 503 (Okla. 1994) *cert. denied* ___ U.S. ___, 116 S.Ct. 476, 133 L.Ed.2d 405 (1995).

The Oklahoma Supreme Court also reasoned that because Oklahoma allows itself to be sued for breach of contract, the principles of comity enable Oklahoma to disregard an Indian tribe's federally defined and controlled sovereign immunity. The Oklahoma Supreme Court thus ignored both the requirement of either a Congressional

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[2]Critical portions of the text of the trial court's ruling are summarized in opinion of the Oklahoma Supreme Court at Appendix, p. 3.

[3]The Oklahoma Supreme Court found that the note was executed outside tribal territory, even though the record contained a written stipulation, signed by the parties, that the note was executed at the tribal governmental complex.

waiver or tribal consent and the Tribe's express reservation of its sovereign rights in the note sued upon. For authority, the Oklahoma Supreme Court relied upon New Mexico's decision in *Padilla v. Pueblo of Acoma*, 107 N.M. 174, 754 P.2d 845 (1988) *cert. denied* 490 U.S. 1028, 109 S.Ct. 1767, 104 L.Ed.2d 202 (1989).

The case was remanded for further proceedings. A money judgment was entered against the Tribe on February 14, 1996.

REASONS FOR GRANTING THE WRIT

THE OKLAHOMA SUPREME COURT DECIDED AN ISSUE OF INDIAN TRIBAL SOVEREIGNTY IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND CONFLICTS WITH 'OVERRIDING' CONGRESSIONAL GOALS OF TRIBAL ECONOMIC DEVELOPMENT.

Commerce and relations with Indian tribes are the exclusive province of federal law. United States Constitution, Article I, sec. 8, cl. 3; Article 2, cl. 2; *Oneida County, N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 105 S.Ct. 1245, 1251, 84 L.Ed.2d 169 (1985). The definition of Indian tribal sovereignty is also a matter of federal law. *Iowa Mutual Insurance Company v. La Plante*, 480 U.S. 9, 107 S.Ct. 971, 975, 94 L.Ed.2d 10 (1987). This Court has consistently defined tribal

sovereignty to include immunity from suit, absent Congressional or tribal consent. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978). Because consent alone gives jurisdiction over a tribal sovereign, without that consent, any attempted exercise of judicial power over a tribal sovereign is void. *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 60 S.Ct. 653, 656, 84 L.Ed. 894 (1940).

Tribal sovereign immunity is essential to promote the federal policies of tribal self-determination and economic development. It allows tribes to regulate, by contract, the extent of economic risk assumed in a transaction. Encouraging tribal self-government and economic development is an "overriding goal" of Congress. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083, 1092, 94 L.Ed.2d 244 (1987).

In limited cases, such as regulatory or taxation disputes, this Court recognizes a degree of judicial power to resolve sovereignty conflicts between states and tribes. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 115 (1973); *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959). These cases do not find jurisdiction based upon either Congressional or tribal consent to suit. Rather, these cases create jurisprudence that measures the limits of acceptable action against a tribe by deciding whether there is a federal preemption of state laws or whether the action would infringe upon tribal self-government. *Mescalero*, 93 S.Ct. at 1270. This analysis of tribal sovereignty, almost by definition, is restricted to sovereignty disputes arising from

efforts to impose state regulatory laws upon tribes. *In re Greene*, 980 F.2d 590 (9th Cir. 1992), *cert. denied* ____ U.S. ____, 114 S.Ct. 681, 120 L.Ed.2d 649 (1994). This jurisprudence has not changed the rule that tribes are immune from damage suits, absent some consent.

This Court's most recent case on tribal immunity to damage suits reiterated that, absent consent, Indian tribes are immune to damage suits. In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) this Court refused "to modify the long-established principle of tribal sovereign immunity" in response to the Oklahoma Tax Commission's attempt to recover a money judgment against an Indian tribe.

In this case, the Oklahoma Supreme Court decided to do what this Court refused to do in *Citizen Band*. The Oklahoma Supreme Court held that a damage award could be entered against the Tribe regardless of whether it is a federally recognized sovereign. The Oklahoma Supreme Court reasoned that the Tribe lost its immunity by engaging in commerce outside tribal territory. This decision conflicts with this Court's position in *Citizen Band* and it ignores Congress' overriding goal of tribal economic development. It also performs a substantive "re-writing" of the contract by, in effect, writing in a waiver of immunity that was, by express terms, refused by the Tribe.

Absent review, the Oklahoma Supreme Court's conflicting decision will stand as authority for Oklahoma district courts. Oklahoma has thirty-six federally recognized Indian tribes within its borders, and thus, the Oklahoma

Supreme Court's decision will involve tribes other than Petitioner. Many of these thirty-six Indian tribes will find that virtually all of their commerce must necessarily occur, at least in part, outside tribal territory. In many instances, tribal territory is either too small or too remote to be conducive to any commerce. As a practical matter, some tribes may lose all immunity.

The Oklahoma Supreme Court cannot eliminate an essential element of federal policy and frustrate an overriding Congressional goal. Certiorari should be granted because a doubtful determination of an important question of state power over Indian affairs is reason for granting certiorari. *Williams*, 79 S.Ct. at 269.

THERE IS A CONFLICT BETWEEN A DECISION OF THE OKLAHOMA SUPREME COURT AND A DECISION OF THE COURT OF APPEALS FOR THE TENTH CIRCUIT ON THE ISSUE OF TRIBAL IMMUNITY TO DAMAGE SUITS.

The Court of Appeals for the Tenth Circuit recognizes that, as a matter of federal law, an Indian tribe is immune to damage suits, absent a clear waiver by the tribe or Congressional abrogation. *Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F.2d 1166 (10th Cir. 1992). This holding is consistent with a long line of decisions by this Court. *Santa Clara Pueblo*, 98 S.Ct. at 1677; *United States Fidelity & Guaranty Co.*, 60 S.Ct. at 656.

Recently, the Court of Appeals for the Tenth Circuit held that, in the absence of tribal or Congressional waiver of immunity, tribal immunity to damage suits applied to a tribe's conduct of commerce outside of tribal territory. *Sac & Fox Nation v. Hanson*, 47 F.3d 1061 (10th Cir. 1995) *cert. denied* ___ U.S. ___, 116 S.Ct. 57, 133 L.Ed.2d 21 (1995). In so doing, the Court of Appeals for the Tenth Circuit addressed a question raised in the *Citizen Band* concurring opinion as to whether a tribe's immunity is limited by geographical boundaries. *Citizen Band*, 111 S.Ct. at 912. The Tenth Circuit answered the question in a manner consistent with long established, clearly articulated precedent from this Court.

In this case, the Oklahoma Supreme Court also answered the question of whether tribal immunity has geographical limits. Despite *Hanson* and a legion of cases from this Court, the Oklahoma Supreme Court reached the singular conclusion that tribal immunity does not apply to a damage suit arising from a tribe's conduct of commerce outside tribal territory. The absence of the federally required waiver of immunity, and the presence of an express reservation of sovereign rights, were immaterial.

The Oklahoma Supreme Court's decision and the decision of the Tenth Circuit are in direct conflict. Either court would have decided the other court's case in an exactly opposite way.

This direct conflict is particularly acute because it raises the question of whether state judicial power concerning tribal immunity is limited by federal law.

Hanson, in which a federal court enjoined a state trial court from exercising jurisdiction over a tribe, makes plain the extent of the problem of this conflict. Unless there is resolution of these two conflicting decisions, tribes wishing to protect their federally recognized rights will be forced to seek federal court injunctions against state court judges. One such case is currently pending in the Western District of Oklahoma, *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Freeman, et al.*, No. CIV-95-1967T, United States District Court for the Western District of Oklahoma. With thirty-six federally recognized Indian tribes in Oklahoma, more cases are bound to follow.

The federal government has a long history of dealing delicately with legal proceedings against states. United States Constitution, Amendment XI; Title 28 U.S.C. 2283 (Anti-Injunction Act); Title 28 U.S.C. § 1341 (Tax Injunction Act); *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) (creating "Younger Abstention"); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983) (creating "Rooker/Feldman Doctrine"). Allowing this conflict to continue unresolved and generate a series of suits for federal injunctions against state court judges is not consistent with the policies underlying the Anti-Injunction Act, the Tax Injunction Act and various concepts of federal abstention. This Court should grant certiorari to provide a resolution of this conflict for both the Oklahoma Supreme Court and the Court of Appeals for the Tenth Circuit.

THE OKLAHOMA SUPREME COURT DECIDED A QUESTION OF TRIBAL SOVEREIGN IMMUNITY WHICH HAS NOT, BUT SHOULD BE, DECIDED BY THE SUPREME COURT.

If there are to be geographical limits on tribal immunity, then those limits should not come from the Oklahoma Supreme Court relying upon the New Mexico Supreme Court for authority. Commerce with Indian tribes and definition of the nature of tribal sovereignty are matters of federal law. United States Constitution Art. 1, sec. 8, cl. 3; *La Plante*, 107 S.Ct. at 975. If states, by ignoring or re-defining tribal immunity, are to join the federal government in the regulation of Indian affairs and commerce with Indian tribes, then that change should come from Congress or this Court.

Review of this case presents the opportunity to set a clear uniform precedent and allow tribes, persons engaging in commerce with tribes, and states to understand the nature and extent of their rights and powers.

CONCLUSION

For the reasons above, the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

ROBERT M. HOOVER, JR.,	)	
	)	
Appellant,	)	
	)	
vs.	)	**No. 78, 185**
	)	
KIOWA TRIBE OF OKLAHOMA, an Indian Nation, J.T. GOOMBI, LEONARD ANQUOE, MAIMIE BOHAY, ALLENE WOODWARD, GEORGE TAHBONE and CHARLES HINES,	)	
	)	
Appellees,	)	

APPEAL FROM DISTRICT COURT OF OKLAHOMA COUNTY

The Kiowa Tribe of Oklahoma, through its Tribal Council, entered into a contract with the appellant, Robert M. Hoover, Jr., a non-Indian, in which the Tribe borrowed funds from the appellant and pledged common stock in an Oklahoma corporation as collateral. The Tribe then defaulted and the appellant brought suit in state district court against the Tribe for breach of contract and against six individual Kiowa Indians for fraud in the inducement of a

contract. The district court dismissed the suit for lack of jurisdiction.

REVERSED AND REMANDED.

William J. Robinson
Shirk, Work, Robinson & Work, P.C. For Appellant
Oklahoma City

Nathan H. Young III For Appellee
Tahlequah, Oklahoma

ALMA WILSON, Chief Justice:

The issue is whether a contract between an Indian tribe and a non-Indian is enforceable in state court when the contract is executed outside of Indian Country. We hold that it is enforceable.

FACTS

On April 3, 1990, the Kiowa Tribe of Oklahoma, represented by the individuals named in Hoover's complaint,[1] made, executed and delivered to Robert M. Hoover, Jr., a promissory note for $142,500.00, and

[1]The individuals named in Hoover's complaint are J.T. Goombi, Leonard Anquoe, Maimie Bohay, Allene Woodward, George Tahbone and Charles Hines.

executed a security agreement on the same date pledging as security 5,000 shares of common stock of Clinton-Sherman Aviation, Inc.[2] The tribe allegedly breached the contract by failing to make any of the agreed payments. After proper notice to the tribe, Hoover sold the stock at public auction.[3] Thereafter, Hoover brought this action in Oklahoma state court. The tribe moved to dismiss due to lack of jurisdiction, claiming that Hoover had not exhausted his tribal remedies and that the tribe could not be subjected to state court jurisdiction due to tribal sovereign immunity. The trial court agreed and ruled:

> (1) the only means by which an Indian Tribe can be sued is if a) Congress of the United States has authorized the suit by specific legislation, or b) the Indian Tribe has clearly waived its sovereign immunity; (2) although the subject contract does not relate to Indian lands or trust lands, the funds to pay the amount contracted for comes from the Kiowa Tribe and the payment affects the tribe's economic interest; (3) to construe the immunity to suit as not applying to suits on liabilities arising out of private transactions would defeat the very purpose of Congress in not relaxing the immunity, namely, the

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[2]Clinton-Sherman Aviation, Inc. is an Oklahoma corporation engaged in aircraft repair and maintenance at the Clinton-Sherman Air Force Base, located outside Indian County.

[3]Hoover himself was the highest bidder and purchased the stock for the sum of $1.00.

> protection of the interests and property of the tribes and the individual Indians; (4) due to the express clauses in the note and security agreement stating that sovereign immunity was not waived, the state court does not have jurisdiction.

Hoover appealed.

TRIBAL SOVEREIGN IMMUNITY

The Kiowa Tribe claims that the state of Oklahoma cannot obtain jurisdiction over the tribe because it is vested with sovereign immunity, and therefore the appellant is precluded from suing the tribe. But Hoover answers that the tribe makes no distinction between activities taking place on the reservation, and those taking place off the reservation. He quotes from *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149, 93 S.Ct. 1267, 36 L.Ed.2d 114 (9173) that: "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State."

It is settled that absent express federal law to the contrary, state courts have jurisdiction over the merits of a tribal immunity defense to claims arising under state laws. *Oklahoma Tax Commission v. Graham*, 489 U.S. 838, 109 S.Ct. 1519, 103 L.Ed.2d 924 (1989). It is also settled that state laws may be applied to Indians, even on reservations, "unless such application would interfere with reservation

self-government or impair a right granted or reserved by federal law. . . . State authority over Indians is yet more expansive over activities, such as in this case, not on any reservation." *Organized Village of Kake v Egan*, 369 U.S. 60, 75, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962).

In *Lewis v. Sac and Fox Tribe of Oklahoma Housing Authority*, 896 P.2d 503, 508 (Okla. 1994), we recognized this test as the preliminary inquiry that must be made whenever Indian interests are included in a controversy. In *Lewis*, two tribal members entered into a contract by which title to their home and land would pass to them on September 1, 1990. When they received a warranty deed conveying the surface rights only, they sued for specific performance and an accounting for all oil and gas revenues the Housing Authority had received since the date of the conveyance. The Authority objected to the jurisdiction of the district court. One of the issues was whether Congress had affirmatively ousted state courts of their concurrent jurisdiction to entertain contract actions involving land transactions between Indian buyers and state-created Indian housing authorities. This Court held that Congress had not, and that Oklahoma has inherent concurrent jurisdiction. *Lewis*, 896 P.2d at 505. But this Court did not deal with the issue of sovereign immunity of the tribe because the issue was not argued on appeal, and had been specifically abandoned. *Lewis*, 896. P.2d at 511.

The Supreme Court of New Mexico, in *Padilla v. Pueblo of Acoma*, 107 N.M. 174, 754 P.2d 845 (1988), *cert. denied* 490 U.S. 1029 (1989), had before it the same issue of whether a state court had jurisdiction over a breach of

contract action between a non-Indian and an Indian tribe, the Pueblo of Acoma. The plaintiff was a roofing consultant who had supervised the installation of roofs for the Pueblo of Acoma d/b/a Sky City Contractors, on two building projects located off the Acoma reservation. The Pueblo moved to dismiss the suit for lack of subject matter jurisdiction on the grounds of sovereign immunity, which the district court granted. The Supreme Court of New Mexico reversed. The court stated that the issues as "whether the state courts have the power and authority to exercise jurisdiction over an Indian tribe that has not waived its sovereign immunity for liability claimed to arise out of the tribe's off-reservation conduct." *Padilla*, 754 P.2d at 847. The court based its analysis in terms of whether the supreme law of the land had divested state courts of subject matter jurisdiction over a private claim against an Indian tribe that asserts sovereign immunity for its off-reservation business conduct.

The New Mexico court held that the exercise of jurisdiction over a sovereign Indian tribe for off-reservation conduct was solely a matter of comity. That court reasoned that since it was the policy of New Mexico to allow breach of written contract actions against the state, the district court may exercise jurisdiction over an Indian tribe engaged in activity off of the reservation for breach of contract. The New Mexico court cited *Nevada v. Hall*, 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979) for the proposition that even though a sovereign may not be sued in its own courts without its consent, that doctrine does not necessarily support a claim of immunity in another sovereign's courts. The Supreme Court of the United States held that there was no

constitutional provision that prohibits a state's exercise of jurisdiction over sovereign sister states. *Nevada*, 440 U.S. at 426. "Therefore, the policy of a state to refrain from the exercise of jurisdiction over a sister state is solely a matter of comity." *Padilla*, 754 P.2d at 850.

Oklahoma, like New Mexico, permits suits for breach of contracts against the state. *See, Cook v. Oklahoma Bd. of Public Affairs*, 736 P.ed 140 (Okla. 1987) (general contractor sued Oklahoma Board of Public Affairs for breach of contract when contractor was removed from the job). Although this state does not have a reservation system like the state of New Mexico, the reasoning used by that court is persuasive.

As we explained in *Lewis* and we now reiterate, "[W]henever Indian interests are tendered in a controversy, a state court must make a preliminary inquiry into the nature of the rights sought to be settled. Only that litigation which is explicitly withdrawn by Congress or that which infringes upon tribal self-government stands outside the boundaries of permissible state-court cognizance." *Lewis*, 896 P.ed at 508, footnote omitted. Accordingly, we hold that a contract between an Indian tribe and a non-Indian is enforceable in state court when the contract is executed outside of Indian County.

The resolution of that issue moots the issue of whether sovereign immunity covers tribal officials acting within their capacity as officers of the tribe. Whether or not the tribal officials, individually, should be held liable for the breach of contract is not before this Court.

REVERSED AND REMANDED.

WILSON, C.J., LAVENDER, HARGRAVE, OPALA and WATT, J.J., concur.

KAUGER, V.C.J., SIMMS, and SUMMERS, J.J., dissent.

HODGES, J., not participating.

(2)

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Petition For Writ Of Certiorari To The Supreme Court Of Oklahoma

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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March __, 1996

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QUESTION PRESENTED FOR REVIEW

May an Indian tribe be sued in state court for breach of a contract involving economic development off reservation?

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STATEMENT OF THE CASE

As noted by the Oklahoma Supreme Court, the note and security agreement at bar were made, executed, and *delivered*. The Petitioners Statement of Case fails to relate that the *delivery* took place off-reservation (R.63).[1]

Of course, black-letter law supports that proposition that delivery is the essence of the contract and constitutes the issuance of the instrument. Delivery is the evidence of the consummation of the contract: see, e.g., 11 Am. Jur. 2d, Bills and Notes, §§269, 270. It is uncontroverted that the transaction:

1. occurred off reservation;
2. is a commercial investment;
3. is between an Indian tribe and a non-Indian;
4. does not involve "Indian land"; and,
5. culminated in a default in the payment of the note by the tribe.

REASONS FOR DENYING THE WRIT

INDIAN TRIBES MAY NOT INVOKE SOVEREIGN IMMUNITY IN ACTIONS TO APPLY NONDISCRIMINATORY STATE LAW TO CONTRACTS INVOLVING ECONOMIC DEVELOPMENT OFF RESERVATION

The Petitioner's reasons for granting the writ ignore those portions of the cases cited which either uphold the right of suit for off-reservation activities of tribes or delimit the invocation of immunity (impunity?).

[1] The trial court acknowledged that "(T)his case does not involve activities on an Indian reservation or on trust lands . . .". (R. 68)

Of particular vitality is that portion of *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 36 L.Ed.2d. 114, 93 S.Ct. 1267, where this Honorable Court stated:

> "But tribal activities conducted outside the reservation present different considerations. "State authority over Indians is yet more extensive over activities . . . not on any reservation." *Organized Village of Kake*, supra, at 75, 7 L.Ed.2d 573. Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally [411 U.S. 149] been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State. See, e.g., *Puyallup Tribe v. Department of Game*, 391 US 392, 398, 20 L.Ed 2d 689, 88 S.Ct. 1725 (1968); *Organized Village of Kake*, supra, at 75-76, 7 L.Ed.2d 573; *Tulee v. Washington*, 315 US 681, 683, 86 L.Ed 1115, 62 S.Ct 862 (1942); *Shaw v. Gibson-Zahniser Oil Corp.*, 276 U.S. 575, 72 L.Ed 709, 48 S.Ct. 333 (1928); *Ward v. Race Horse*, 163 US 504, 41 L.Ed 244, 16 S.Ct. 1076 (1896). That principle is as relevant to a State's tax laws as it is to state criminal laws, see *Ward v. Race Horse*, supra, at 516, 41 L.Ed. 244, and applies as much to tribal ski resorts as it does to fishing enterprises. See *Organized Village of Kake*, supra."

In *Organized Village of Kake v. Egan*, 369 US 60, 7 L.Ed.2d 573, 82 S.Ct 562, Mr. Justice Frankfurter opined:

> "But state regulation of off-reservation fishing certainly does not impinge on treaty-protected reservation self-government, the factor found decisive in *Williams v. Lee*." [358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959)]

The principles enunciated by the unanimous Court in *Kake*, supra, were extended in *Mescalero*, supra, to the right of a state (New Mexico) to impose a tax on the gross receipts of a ski resort owned and operated by an Indian tribe off reservation.

The sovereign immunity sought by the tribe is more narrow than that desired by the tribe. *Santa Clara Pueblo et al. v. Martinez*, 436 U.S. 49, 56 L.Ed.2d 106, 98 S.Ct. 1670, is most often cited for the proposition that an indian tribe cannot be sued unless it has waived sovereign immunity. Close examination, however reveals that a female member of the Santa Clara Pueblo, a tribe, and her daughter brought the action for declaratory and injunctive relief against the tribe claiming an ordinance of the tribe denying tribal membership to the children of female tribe members who married outside the tribe, while extending membership to the children of male members who married outside the tribe, violated Title I of the Indian Civil Rights Act, 25 USCS §1301-1303. The Court held that the action was barred by the sovereign immunity of Indian tribes.

This is *not inconsistent* with the case cited by the Oklahoma Supreme Court as one of the authorities for its holding, i.e., *Lewis v. Sac and Fox Tribe of Oklahoma Housing Authority*, 896 P.2d 503 (Okla. 1994) cert. denied. ____ U.S. ____ 116 S.Ct. 476, 133 L.Ed.2d 405 (1995), and

the expressions of United States Supreme Court that Indian tribes, while losing powers inconsistent with their dependent, domestic status, retain the powers over tribal membership and tribal lands.

It is interesting to note that the majority, in *Santa Clara*, supra, at page 56, acknowledged that while the tribes are "no longer 'possessed of the full attributes of sovereignty', they remain a 'separate people, with the power of regulating their internal and social relations,'" citing *United States v. Wheeler*, 435 U.S. 313, 55 L.Ed.2d 303, 98 S.Ct. 1079, where at page 323, this Court states:

> "We have recently said: 'Indian tribes are unique aggregations possessing attributes of sovereignty over both their *members* and their *territory* . . .' ". (emphasis added)

Little note has been taken of the syllabus in *Martinez*, supra:

> "Indian tribes are distinct, independent political communities retaining their original natural right in matters of local self-government: although no *longer possessed of the full attributes of sovereignty*, they remain a separate people, with the power of regulating their *internal* and *social affairs*". (emphasis added)

In citing *Oklahoma Tax Commission v. Citizens Bank Pottawatomie Indian Tribe of Oklahoma*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991), the tribe ignores Justice Stevens' concurring opinion:

> "Nevertheless, I am not sure that the rule of tribal sovereign immunity extends to cases arising from a tribe's conduct of commercial activity outside its own territory".

In the *Lewis* case, supra, the Oklahoma Supreme Court stated that the teaching that:

> "... 'absent governing Acts of Congress, the question has always been whether the state action infringed upon the right of reservation Indians to make their own laws and be ruled by them', does not stand as authority defeating concurrent state jurisdiction *in all civil cases."*

That Court went on to say, in *Lewis,* supra:

> "The U. S. Supreme Court's jurisprudence clearly supports the notion that not every controversy affecting Indians and their lands lies outside state court jurisdiction".

In *Iowa Mutual Ins. Co. v. La Plante,* 480 U.S. 9, 94 L.Ed.2d 10, 107 S.Ct. 971, the complaint stated two causes of action: the first named the owners of a ranch (on the Blackfeet Indian Reservation and members of that tribe) for compensation for personal injuries sustained by an employee on the ranch while employed there and the second alleged a claim for compensatory and punitive damage against an insurance company for bad-faith refusal to settle. The question before the U.S. Supreme Court was whether a federal court may exercise diversity jurisdiction before the tribal court sys-

tem has an opportunity to determine its own jurisdiction. The court, recognizing the concurrent jurisdiction of federal and tribal courts, remanded the case to the tribal court for exhaustion of tribal remedies.

The most that can be said insofar as may be pertinent to this case is the opinion that:

> "Tribal authority over the activities of *non-Indians on* reservation lands is an important part of tribal sovereignty." (emphasis added) 107 S.Ct. 971, 977.

La Plante, supra, cannot be expanded to deny respondent the recovery herein.

The United States Supreme Court has reviewed the tradition of sovereignty and Mr. Justice Rhenquist found that no immunity for off-reservation activities had traditionally been recognized (concurring in part and dissenting in part, in *Washington v. Confederate Tribes of Colville Indian Reservation, et al.*, 447 U.S. 134, 65 L.Ed.2d 10, 100 S.Ct. 2069, P. 2093, citing at P.2095, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114, and *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129[2].

[2] Mr. Justice Rhenquist also concluded "when tradition did not recognize a sovereign immunity in favor of the Indians, this court would recognize one only if congress expressly conferred one". The theme of this Response is that one cannot pronounce "we're Indian" and, ipso facto a fortiori, have sovereign immunity and be free from state laws and regulation.

IF A CONFLICT BETWEEN JURISDICTIONS EXISTS, IT IS THE CONFLICT OF THE COURT OF APPEALS FOR THE TENTH CIRCUIT WITH THIS COURT'S JURISPRUDENCE ON THE AMENABILITY OF AN INDIAN TRIBE TO STATE COURT JURISDICTION

The "long line" of cases is non-existent.

Santa Clara Pueblo, supra, cannot be said to be a "damage" suit.

Likewise, reliance on *United States v. United States Fidelity and Guaranty Co.,* 309 U.S. 506 (1940), is misplaced. Within the usual framework of the facts of that case, the United States of America, acting through the Superintendent of the Five Civilized Tribes for the Choctaw and Chickasha Nations, filed a claim on behalf of the Indians Nations in a corporate reorganization under §77B of the then Bankruptcy Act. A cross claim was denied. Also involved, however, was Act of April 26, 1906 §18, 34 Stat. at L. 137, 144, 148, chap 1876, in which Congress had made provision for cross-suites against Indian Nations by defendants. After reciting complexities created by "Civil Rules" and the "Conformity Act", the Court stated:

> ". . . we do not pass upon the question of whether the Company defendant has any cross-claim against the Indian Nations, after the satisfaction of the Indian Nations' claim against it or whether, if there is such a claim, owned

> jointly with the corporation, it is a claim the Company may enforce as defendant under §18."

Certainly, the factual circumstances involved with the claim by the United States, through the Superintendent, on behalf of Tribes, require that the decision be confined to the facts of that case.

The effort by the Tenth Circuit, in *Sac and Fox Nation v. Hanson*, 47 F.3d 1061 (10th Cir. 1995), cert. denied, ____ U.S. ____ , 116 S.Ct. 57, 133 L.Ed.2d 21 (1995), to overcome the concurring opinion of Mr. Justice Stevens' in *Citizens Bank Pottawatomie Indian Tribe of Oklahoma*, supra, is sophistic.

His opinion on off-reservation commercial conduct is consistent with the opinion in *Mescalero*, supra, and the cases cited thereon, recognizing the on/off reservation dichotomy.

Moreover, no assertion has been made that the judgment interferes with the tribal self government or the authority of a tribe over its membership.

THIS COURT, NOT THE OKLAHOMA SUPREME COURT, PROVIDED GEOGRAPHICAL BOUNDARIES TO TRIBAL IMMUNITY

In *New Mexico v. Mescalaro Apache Tribe*, 462 U.S. 324, 76 L.Ed 611, 103 S.Ct. 2378, this court stated that "our cases have recognized that tribal sovereignty contains

a 'significant geographical component,'" citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 65 L.Ed.2d 665.

CONCLUSION

For reasons cited above, the writ of certiorari should be denied.

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(3)

Supreme Court, U.S.
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No. 95-1419

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

THE KIOWA TRIBE OF OKLAHOMA,

Petitioner,

v.

ROBERT M. HOOVER, JR.,

Respondent.

On Petition For Writ Of Certiorari To
The Supreme Court Of Oklahoma

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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In The
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THE KIOWA TRIBE OF OKLAHOMA,

Petitioner,

v.

ROBERT M. HOOVER, JR.,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner, The Kiowa Tribe of Oklahoma, (the "Tribe") respectfully replies to Respondent's Brief in Opposition to Petition for Writ of Certiorari.

OKLAHOMA HAS NO AUTHORITY TO ENTER A MONEY JUDGMENT AGAINST THE TRIBE

Respondent correctly observes that disputes between state and tribal sovereigns over taxation and regulation have, even in the absence of tribal consent to suit, led to the exercise of judicial power over tribes. (See Petition for Writ of Certiorari, p. 7). The Oklahoma Supreme Court, however, has stretched the taxation and regulatory analysis of tribal sovereignty into justification for exercising jurisdiction over a private damage suit against an Indian tribe. It is this stretching that has put the Oklahoma Supreme Court into direct conflict with both this Court and with overriding Congressional goals.

In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) this Court exercised jurisdiction to resolve a dispute concerning tribal responsibility for collection of Oklahoma's cigarette tax. The Court imposed upon the tribe an obligation to assist Oklahoma in collecting a validly imposed state tax. But, this Court refused Oklahoma's request for a damage judgment against the tribe. In refusing Oklahoma's request for a damage judgment, this Court plainly recognized both tribal immunity and that tribal immunity was a factor in Congress' "overriding goal" of encouraging tribal self sufficiency and economic development. 111 S.Ct. at P. 910. *Citizen Band* shows, in a single case, the difference in approach between taxation disputes and damage suits.

Quite simply, in this case, the Oklahoma Supreme Court has done exactly what this Court found improper in *Citizen Band*. In the time since this Court decided *Citizen Band*, there has been no change either in the law of tribal immunity or in Congress's overriding goals concerning federally recognized Indian tribes. Thus, the conclusion must be that the Oklahoma Supreme Court is determined to pursue a course that directly conflicts with both decisions of this Court and Congressional policy.

The fallacy of the Oklahoma Supreme Court's position is demonstrated by comparing the Oklahoma Supreme Court opinion in this case, ("Only that litigation which is explicitly withdrawn by Congress or which infringes upon tribal self-government stands outside the boundaries of permissible state-court cognizance" [Appendix, Petition For Writ of Certiorari, p. 7]) to this Court's opinion in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894 (1940) ("Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void." 60 S.Ct. at 657) In short, Oklahoma assumes its own power, in the absence of a Congressional withdrawal of that power. On the other hand, federal law assumes tribal immunity, in the absence of tribal consent or Congressional abrogation of that immunity. The two approaches are directly contrary.

OKLAHOMA INTENDS TO CONTINUE ENTERING MONEY JUDGMENTS AGAINST INDIAN TRIBES

On March 5, 1996, the Oklahoma Supreme Court decided *First National Bank v. Kiowa, Comanche and Apache Intertribal Land Use Committee*, No. 84,301, 67 Okla. B.J. 871 (March 9, 1996) and used its decision in this case to find state court jurisdiction over a private damage suit against federally recognized Indian tribe. (See Appendix hereof for text of the *First National Bank* opinion) In *First National*, however, two Justices of the Oklahoma Supreme Court, dissented and expressly stated that the Oklahoma Supreme Court is in direct conflict with the decision of the Court of Appeals for the Tenth Circuit in *Sac & Fox Nation v. Hanson*, 47 F.3d 1061 (10th Cir. 1995) *cert. denied* ____ U.S. ____, 116 S.Ct. 57, 133 L.Ed.2d 21 (1995). Thus, contrary to Respondent's suggestion, a clear conflict exists between the Oklahoma Supreme Court and the Court of Appeals for the Tenth Circuit.

The *First Nation Bank* decision makes clear: (1) the Oklahoma Supreme Court and the Court of Appeals for the Tenth Circuit are in direct conflict upon a question of state power over commerce and relations with Indian tribes (2) the Oklahoma Supreme Court, upon re-visiting the conflict, unmistakably chose to remain in conflict with the Court of Appeals for the Tenth Circuit.

The Oklahoma Supreme Court has now made its position absolute. This case is not an aberration, but, rather, it is a major shift in Oklahoma's policy toward federally

recognized Indian tribes. By intentionally choosing to remain in conflict with the Court of Appeals for the Tenth Circuit, the Oklahoma Supreme Court invites review.

As suggested in the Petition for Writ of Certiorari, absent Supreme Court review, the thirty-six Oklahoma based Indian tribes that wish to protect their federally recognized immunity must seek federal court injunctions against state court judges. Such a remedy, however, is narrow. It is perhaps narrower than the Tribe initially recognized. *See Seminole Tribe of Florida v. Florida*, 64 U.S.L.W. 4167 (March 27, 1996) (Amendment XI immunity is not abrogated by Indian Gaming Regulatory Act). If Oklahoma will not recognize tribal immunity and the federal injunctive remedy is narrow, then Oklahoma is left with much room to tinker freely with Indian commerce and Indian tribes -- areas in which states are divested of virtually all authority. *Id. at 64 U.S.L.W. 4712*. Because the injunctive remedy is narrow and because the federal matters of relations and commerce with Indian tribes should not be decided by states, it is appropriate to resolve this conflict by Supreme Court review.

SOVEREIGN IMMUNITY DOES NOT CEASE TO EXIST MERELY BECAUSE A TRIBE ACTS OUTSIDE INDIAN COUNTRY

Respondent again draws upon taxation and regulatory jurisprudence, this time to argue that tribal immunity has a "geographical component." Presumably, Respondent makes this observation to suggest that an Indian tribe, if caught off Indian Country, is not due, from the state, full recognition

of its status as an Indian tribe. Admittedly, taxation and regulation disputes between sovereign entities inescapably involve inquiry into the geographical location of key events. The location of the "taxable event" or the location of the object of regulation are tools to determine what sovereign's law applies. But, using geography as a tool to choose between competing sovereign laws is far removed from using geography as a reason to ignore an essential characteristic inherent in the nature of a sovereign.

This case is less an issue of geography and more an issue of a federally recognized Indian tribe's essential and inherent nature. This case bring into question the power of a state to re-define, in direct conflict with federal law and Congressional policy, an Indian tribe's essential and inherent nature. If states are to strip Indian tribes of the essential characteristics attributed to them by federal law -- including the characteristic of immunity -- then the state must get that power from the federal government. States have no such inherent power. This is so because relations and commerce with Indian tribes are within the exclusive province of the federal government. United States Constitution, Article I, sec. 8, cl. 3; Article 2, cl. 2; *Oneida County, N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 105 S.Ct. 1245, 1251, 84 L.Ed.2d 169 (1985). Here, Oklahoma is plainly assuming the power unto itself.

Because the Oklahoma Supreme Court has stretched existing law to the point that it has raised an important issue of state power over Indian affairs, certiorari is proper. *Williams v. Lee* 358 U.S. 217, 91 S. Ct. 269, 3 L.Ed.2d 251 (1959).

CONCLUSION

For the reasons above, the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

FIRST NATIONAL BANK IN ALTUS, a national banking association,	)	
Appellant,	)	
vs.	)	**No. 84,301**
KIOWA COMANCHE AND APACHE INTERTRIBAL LAND USE COMMITTEE,	)	
Appellees,	)	

APPEAL FROM THE
DISTRICT COURT OF JACKSON COUNTY

Trial judge granted Intertribal Land Use Committee's motion to dismiss for lack of subject matter jurisdiction on grounds of sovereign immunity from suit. Appellant argued on appeal that Tribe's engaging in commercial activity outside of Indian County barred application of sovereign immunity doctrine. Our recent decision in *Hoover v. Kiowa Tribe*, 909 P.2d 59 (Okla. 1995), is dispositive.

REVERSED AND REMANDED

Daniel E. McMahan, Denise M. Fletcher, Ivester, Braddock, McMahan, & Duffy, P.C., Altus, Oklahoma, For Appellant. Glenn M. Feldman, O'Connor, Cavanaugh, Anderson, Westover, Killingsworth & Beshears, P.A., Phoenix, Arizona, Bob Rabon, Rabon, Wolf and Rabon, Hugo, Oklahoma, For Appellee.

HARGRAVE, J.: The question before us is whether a contract between a tribal enterprise engaged in commercial activity outside Indian county and a non-Indian may be enforced in state court. Our recent decision in *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okla. 1995), is dispositive of the issue. In that case we held that suit on a contract executed outside of Indian country between an Indian tribe and a non-Indian was enforceable in state court.

The Kiowa, Comanche and Apache tribes formed the Intertribal Land Use Committee ("Intertribal Committee"), which was adopted by the governing bodies of the three participating tribes in 1966. Three members from each tribe were designated to serve for an indefinite period until relieved or replaced by a succeeding general council or organization adopted by the tribe. The representatives were vested with the authority of their particular tribal general councils to enter on its behalf into leases, permits, easements, and other transactions, except the sale thereof, relating to tribal lands commonly owned by the three tribes to the extent that the general council of each tribe could so act, and any action taken by the Intertribal Committee had to be concurred in by at least two of the three members of the representatives of each separate tribe.

The First National Bank in Altus (Bank) loaned money to the Intertribal Committee for use in their dressmaking operation in Altus, Oklahoma. The first loans were made in 1990 for $100,000 and $175,000. The Bank's petition states that the contracts were entered into at the bank's offices. The Intertribal Committee represented to the Bank that it was a body corporate, duly organized, validly existing, and in good standing under the tribal constitutions, resolutions and statutes of the Kiowa, Comanche and Apache Indian tribes, and that the promissory notes executed by the Intertribal Committee were duly authorized, executed and delivered by the Committee and were enforceable in accordance with their respective terms under federal, tribal and Oklahoma law, "except as enforceability may be limited by bankruptcy, insolvency, reorganization or other laws affecting the enforcement of creditors rights generally." Bank also obtained an opinion from the Intertribal Committee's legal counsel containing the same language.

In 1991, Bank agreed to provide additional financing to enable the Intertribal Committee to restructure the financing of its sewing operation. Accordingly, the Intertribal Committee executed four promissory notes totalling $865,000.00

The Intertribal Committee defaulted on the loans and Bank filed a petition in state court alleging that the Intertribal Committee had borrowed and failed to repay approximately $560,034.45, plus interest, seeking judgment against the Intertribal Committee. The individual tribes were not named as defendants. The Intertribal Committee filed a motion to dismiss for lack of jurisdiction based upon tribal sovereign

immunity. The trial court dismissed the action for lack of jurisdiction and denied Bank's motion to reconsider. Bank appealed.

During the pendency of the appeal, we handed down our opinion in *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okla. 1995). The issue in *Hoover* was whether a contract between an Indian tribe and a non-Indian was enforceable in state court when the contract was executed outside of Indian country. We held that it was.

In *Hoover*, the Kiowa tribe, represented by individuals named in the suit, executed a promissory note in favor of Hoover for $142,500.00, pledging as security 5,000 shares of common stock of Clinton-Sherman Aviation. The tribe allegedly failed to make any of the agreed payments, so after proper notice to the tribe, Hoover sold the stock at public auction. Thereafter, Hoover sued the tribe and named individuals in Oklahoma state court. The tribe moved to dismiss for lack of jurisdiction, based on tribal sovereign immunity. The trial court dismissed the suit. We reserved, holding that state court had jurisdiction. We said:

> "It is settled that absent express federal law to the contrary, state courts have jurisdiction over the merits of a tribal immunity defense to claims arising under state laws." *Oklahoma Tax Commission v. Graham*, 489 U.S. 838, 109 S.Ct. 1519, 103 L.Ed.2d 924 (1989).

We noted that it is clear that state laws may be applied to Indians, even on reservations unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law, and that state authority over Indians is even more extensive over activities not on any reservation, citing *Organized Village of Kake v. Egan*. 369 U.S. 60, 82 S.Ct. 562, 71 L.Ed.2d 573 (1962).

Recently, in *Lewis v. Sac and Fox Tribe*, 896 P.2d 503, 509 (Okla. 1994) we said:

> "Under our system of federalism, a state's sovereignty is concurrent with that of the federal government, subject only to limitations imposed by the Supremacy Clause." (citation omitted)

In that case involving a contract dispute between Indian plaintiffs and a state-created Indian Housing Authority, we reiterated that state courts have inherent authority and thus are presumptively competent to adjudicate claims arising under the laws of the Unites States. We held that Oklahoma contract and conveyancing law, rather than tribal law, governed settlement of the dispute. We said:

> "In sum, whenever Indian interests are tendered in a controversy, a state court must make a preliminary inquiry into the nature of the rights sought to be settled. Only that litigation which is explicitly withdrawn by

> Congress or that which infringes upon tribal self-government stands outside the boundaries of permissible state-court cognizance." 896 P.2d at 508.

Bank in the case at bar, makes similar arguments, citing *Mescalero Apache Tribe v. Jones*, 93 S.Ct. 1267 (1973) and *Puyallup Tribe v. Dept. of Game*, 88 S.Ct. 1725 (1968); *Organized Village of Kake v. Egan*, 82 S.Ct. 562 (1962), *Tulee v. Washington*, 315 U.S. 681 (1942), *Shaw v. Gibson-Zahniser Oil Corp.*, 48 S.Ct. 333 (1928). These cases dealt with the issue of tribal sovereignty, concerning among other things, fishing rights, ad valorem tax levies, and, in *Oklahoma Tax Commission v. Chickasaw Nation*, 115 S.Ct. 2214 (1995), upholding the state's power to tax income of tribal members who live outside Indian country but earn their wages from employment in Indian country.

Hoover v. Kiowa Tribe, supra, is dispositive of the question presented and accordingly, we hold that the trial court erred in dismissing the cause.

REVERSED AND REMANDED

CONCUR: WILSON, C.J., HODGES, LAVENDER, SIMMS, HARGRAVE, OPALA, WATT, JJ.

DISSENT: KAUGER (by separate opinion), V.C.J., SUMMERS (joins Kauger, V.C.J.), J.

KAUGER, V.C.J. with whom Summers, J. joins dissenting: I dissent from the majority opinion. It directly contradicts the United States Court of Appeals for the Tenth Circuit's recent decision in *Sac and Fox Nation v. Hanson*, 47 F.3d 1061, 1065 (10th Cir. 1995) which holds that a tribe's sovereign immunity cannot be inferred from the tribe's engagement in commercial activity; and that without an express waiver of sovereign immunity, a tribe is immune from state court -- even if the commercial activity is conducted by a commission or a committee and occurs off of the tribe's reservation.[1]

The Sac and Fox Nation created the Sac and Fox Industrial Development Commission which was made up of

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[1]Judge Tacha, writing for the majority of the Court in *Sac and Fox Nation v. Hanson*, 47 F.3d 1061, 1665 (10th Cir. 1995) said that:

> "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978). Thus suits against Indian tribes are barred absent a clear waiver by the tribe or congressional abrogation. *Oklahoma Tax Comm. v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S.Ct. 905, 909, 112 L.Ed.2d 1112 (1991). A waiver of sovereign immunity cannot be implied by must be unequivocally expressed *United States v. Testan*, 424 U.S. 392, 96 S.Ct. 948, 953-54, 47 L.Ed.2d 114 (1976) (quoting *United States v. King*, 395 U.S. 1, 4, 89 S.Ct. 1501, 1503, 23 L.Ed.2d 52 (1969)) . . . [T]he extra-territorial nature of these transactions does not strip the Nation of its right to assert sovereign immunity . . . Without an explicit waiver, the Nation is immune from suit in state court even if the suit results from commercial activity occurring off the Nation's reservation."

a five-member board of directors. When the Commission defaulted on a contract with the United States Army, several of the Commission's former employees sued the board of directors in state court seeking back pay. The board asserted sovereign immunity from state court proceedings. Here, the Kiowa, Comanche and Apache tribes formed an Intertribal Land Use Committee which consisted of three members from each tribe. The tripartite commission is virtually identical to the Sac and Fox Industrial Development Commission created by the Sac and Fox Nation.

I would overrule *Hoover v. Kiowa Tribe*, 909 P.2d 59 (Okla. 1995) and follow the teaching of *Sac and Fox Nation v. Hanson*, 47 F.3d 1061, 1065 (10th Cir. 1995). A contract between a tribal enterprise engaged in commercial activity outside Indian country and a non-Indian may not be enforced in state court without an express waiver of the tribe's sovereign immunity.